MOTION FILED
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No. 84-1506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF CONSUMER BUREAU IN SUPPORT OF THE PETITIONER

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AIRWORK SERVICE DIVISION,

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF CONSUMER BUREAU[1] IN SUPPORT OF THE PETITIONER

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Consumer Bureau respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The written consent of the attorney for the petitioner herein has been obtained, but the attorney for the respondent herein has refused to consent to the filing of a brief by Consumer Bureau as *amicus curiae*.

The interest of Consumer Bureau is described in the accompanying brief. The brief of the petitioner herein in the New Jersey

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[1] Joseph M. Boyd, of Princeton, N.J., President of Consumer Bureau, is also majority stockholder of The Princeton Community Phone Book, Inc., a New Jersey corporation.

Supreme Court and its petition for a writ of certiorari do not adequately address one element of the substantive due process issue present in this case that is of primary concern to Consumer Bureau, namely:

> *whether, without violation of their right to due process of law, persons who are conscripted to serve as sales tax collectors for any state may be held retroactively liable to pay out of their own pockets sales taxes on transactions which took place at a time when the latest printed and published statements of the state's own tax authorities declared such transactions to be exempt from sales tax.*

Consumer Bureau does not believe that the argument on this point will be expanded and be made complete in this Court unless leave is granted to Consumer Bureau to participate. If Consumer Bureau's argument is accepted by this Court, the decision of the New Jersey Supreme Court must be reversed.

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BRIEF OF AMICUS CURIAE CONSUMER BUREAU IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

STATEMENT OF THE INTEREST OF AMICUS CURIAE

Having obtained leave of the New Jersey Supreme Court to do so, Consumer Bureau participated in argument below, along with the American Civil Liberties Union of New Jersey, as *amicus curiae*, in which capacity Consumer Bureau briefed extensively the constitutional issues which had been raised in this matter in the lower courts and presented these issues also in oral argument before the New Jersey Supreme Court. Positions adopted in this litigation by *amici curiae* Consumer Bureau and the American Civil Liberties Union of New Jersey were thereafter extensively represented in the vigorous dissenting opinion of Justice Garibaldi, in which two other members of that court joined. *Airwork Service Division v. Director, Division of Taxation*, 97 N.J. 290, 478 A.2d 729 (1984).

Consumer Bureau's interest in the subject matter of this proceeding is limited to an issue which is necessarily included within the Question Presented for Review by Airwork in its Petition.[2] That issue is:

> *whether, without violation of their right to due process of law, persons who are conscripted to serve as sales tax collectors for any state may be held retroactively liable to pay out of their own pockets sales taxes on transactions which took place at a time when the latest printed and published statements of the state's own tax authorities declared such transactions to be exempt from sales tax.*

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2. Petitioner Airwork has presented the following question for review:

> May the New Jersey Division of Taxation, consistent with the due process clause of the Fourteenth Amendment, retroactively assess sales taxes against a New Jersey vendor based upon a changed interpretation of the law, which change was adopted without notice or an opportunity to comment in violation of the New Jersey Administrative Procedure Act?

Petition at "i"

Reflecting its urgent interest in the outcome of the *Airwork* case, Consumer Bureau appeals to this Court to prevent the New Jersey Supreme Court's *Airwork* decision from becoming a settled precedent which, in Consumer Bureau's view, would be a continuing disaster for the nationwide army of unpaid state sales tax collectors, very few of whom can afford at any level the cost of a court test of their constitutional right to due process.

Consumer Bureau is a corporation organized and existing under the laws of the state of New Jersey with its principal place of business at 152 Alexander Street, Princeton, New Jersey. Consumer Bureau has continuously since 1967 conducted a consumer information and assistance service similar in some respects to parallel services provided by Better Business Bureaus. Like a Better Business Bureau, Consumer bureau is financed in large measure by local business people who choose to join Consumer Bureau as dues-paying members. One interest which applicant seeks to assert in this proceeding is its own in that, like most organizations conducting business of any kind in New Jersey, applicant must deal on a regular basis with agencies of the state and must comport itself in harmony with applicable statutes and regulations, including those which concern taxes and their application. More importantly, since applicant's community services are primarily financed by its business members who deal directly with consumers and are therefore deeply involved in one way or another with administration of the New Jersey Sales Tax Act, N.J. Stat. Ann. 54:32B-1 *et seq.*, and its interpretation, applicant has a strong collateral interest in protecting its members and other local business people from the arbitrary, capricious and extremely damaging tactic reflected in the case at bar and to which petitioner Airwork Service Division (hereafter, "Airwork") has been subjected by the Tax Division and the courts of the state of New Jersey. The issue set forth above is of substantial public importance.

REASONS WHY THE PETITION SHOULD BE GRANTED[3]

The New Jersey Supreme Court in this case has decided that official printed and published instructions of the Tax Division of the Department of the Treasury of the State of New Jersey, systematically distributed by the agency to businesses in New Jersey and released to Commerce Clearing House for publication, can be declared "unofficial" retroactively to the severe detriment of persons affected thereby. The New Jersey Court has thereby handed to New Jersey's Division of Taxation (and any other agency whose retroactive decisions are capable of having a similarly draconian effect) a license to ignore the most fundamental concepts of due process. That there is no hyperbole in the preceding statement is evident when one considers the potential effect on any business which will necessarily occur if it follows the instructions of a relevant regulatory authority in the conduct of its business only to be told later that it should not have followed them and that it is to be punished for having done so.

The facts relevant to the New Jersey Supreme Court's holding are not in dispute:

1. The New Jersey Sales and Use Tax Act was passed in 1966 and shortly thereafter instructions to sales tax collectors were published and distributed in which the transactions which are the subject of this litigation were declared to be exempt;

2. Airwork refrained from collecting taxes on the subject transactions and was audited by the Tax Division during the relevant period, such audit finding no deficiencies in Airwork's collection of sales taxes;

3. The policy of the Division of Taxation respecting the applicability of sales tax to the subject transactions was officially

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3. Amicus Curiae Consumer Bureau incorporates herein by reference the statement of the case contained in the Petition for Writ of Certiorari filed by Airwork Service Division.

changed in 1973 by notice in the *State Tax News*, following which notification Airwork immediately began collecting taxes on the subject transactions; and,

4. The Tax Division, despite the fact that the announcement was made in 1973, retroactively assessed Airwork over $600,000 in sales taxes which Airwork did not collect during the period in which the state's instructions had been to not collect the tax.[4]

It should be noted here that, in order for Airwork to have avoided what amounts to a $600,000 fine for *obeying* the New Jersey Tax Division's own published instructions, it would in a competitive market have been obliged to take the bizarre position of collecting from its out-of-state customers New Jersey sales taxes at a time when the latest published position of the New Jersey Tax Division was that the services were not subject to New Jersey sales taxes.

In determining that Airwork should have known better than to rely on the State's own instructions, the New Jersey Supreme Court held that the Division's publication was "not shown to be an official statement or pronouncement."[5] *Airwork Service Divi-*

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4. In its decision, the New Jersey Supreme Court made the statement that, prior to the notice in the *State Tax News*, the issue of the taxability of these transactions was resolved in the case of *Fisher-Stevens, Inc. v. Director, Division of Taxation*, 121 N.J. Super. 513, 298 A.2d 77 (App. Div. 1972), *cert. denied*, 62 N.J. 575, 303 A.2d 328 (1973). *Airwork Service Division v. Director*, 478 A.2d at 731, Petition at 6a. The New Jersey Supreme Court's citation of this case is a mystery, not only because the assessment in question reached back to a period prior to publication of the *Fisher-Stevens* decision, but also because a careful analysis of that decision reveals not only that its holding was entirely irrelevant to the transactions in question in this case, but if anything, it implied that the transactions in this case continued to be exempt. At the very least, *Fisher Stevens* is without any arguable factual significance in the context of this proceeding.

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5. The court below made the additional puzzling assertion that, during the relevant period, "[i]t was—or should have been—well known to similarly situated taxpayers that the Division of Taxation was vigorously taking the position that such services were taxable." *Airwork Service Division v. Director, Division of Taxation*, 478 A.2d at 731, Petition at 6a. The Court below did not suggest how Airwork was to have gained this knowledge, nor did the Court identify any legal theory upon which to base its assertion that a taxpayer has the responsibility to seek out and keep abreast of the current state of Tax Division policies. There is in addition no evidence in the record to establish that the Tax Division had in fact adopted the position that subject services were taxable. In fact, the evidence in the record is quite to the contrary.

sion v. Director, Division of Taxation, 97 N.J. 290, 478 A.2d 729, 733 (1984) [at 9a of Airwork's Petition for a Writ of Certiorari, hereinafter "Petition _____"]. It is the position of *amicus* Consumer Bureau that the New Jersey Supreme Court's suggestion in this regard—that the public is somehow possessed of a duty to determine which agency pronouncements are "official" and which are "unofficial" in the conduct of its affairs—is on its face not only in flagrant disregard of Airwork's right to due process but is an open invitation to all state agencies in New Jersey to free themselves from the constraints of the State's Administrative Procedures Act, N.J. Stat. Ann. 52:14B-1 *et seq*., and from the due process clause of the fourteenth amendment to the United States Constitution.

This Court addressed similar circumstances in *Central Illinois Public Service Co. v. United States*, 435 U.S. 21 (1978). In that case, an employer was sought to be held liable retroactively for withholding taxes on meal reimbursements to employees. The employer had refrained from withholding such taxes during a period when there had been no regulatory requirement to do so. Although the court rejected the Internal Revenue Service's retroactive assessment on other grounds, the majority opinion and concurring opinions made it clear that this Court doubted the constitutionality of the Internal Revenue Service's attempt to subject the employer to the same sort of conduct to which Airwork has been subjected in this case. The majority opinion stated:

> An imposition of withholding responsibility on the Company for the lunch reimbursements as far back as 1963 strikes us as somewhat retroactive in character and almost punitive in light of the facts of this case.

435 U.S. at 33, n. 12. The concurring opinion by Justice Stevens, joined in by Chief Justice Burger and Justice Powell, reiterated the same concern:

> I write separately to state more fully my views on why petitioner cannot be subjected *retroactively* to withholding tax on the theory—whether correct or not—espoused here by the government . . .
>
> Those who administer the Internal Revenue Code unquestionably have broad authority to make tax

> rulings and regulations retroactive. *See* 26 U.S.C. §7805(b). . . That authority is not unfettered, however, and conditions are present here that would make retroactive application of the withholding tax to petitioner's lunch payment an abuse of discretion.

435 U.S. at 34-35.

> [W]ithholding taxes should not, at least without good reason, be assessed against employers who did not know of and who had no reason to know of increased withholding obligations at the time wages had to be withheld.
>
> Such notice, as the Court holds, ante . . . was not given petitioner until at least 1967 and, for all that appears, possibly not until our decision in *Commissioner of Internal Revenue v. Kowalski*, 434 U.S. 77 (1977) . . . [T]he likely effect [of upholding the Commissioner's decision] would be that the individual taxpayers who should have reported these meal reimbursements in income will be relieved of all taxes they should have paid, and petitioner will bear the tax directly rather than simply acting as a collection conduit for the United States, a result certainly not intended by Congress.

435 U.S. at 38-39. The same conclusion was reached by Justice Powell and Chief Justice Burger in their concurring opinion:

> It seems particularly inappropriate for the Commissioner, absent express statutory authority, to impose retroactively a tax with respect to years prior to the date on which taxpayers are clearly put on notice of the liability. In other areas of the law, "notice," to be legally meaningful, must be sufficiently explicit to inform a reasonably prudent person of the legal consequences of failure to comply with the law or regulation. In view of the complexities of Federal taxation, fundamental fairness should prompt the Commissioner to refrain from the retroactive assessment of a tax in the

> absence of such notice or of clear Congressional authorization.

435 U.S. at 39. The majority and concurring opinions in *Central Illinois Public Service Co.* indicate that at least eight members of this Court would have rejected as fundamentally unfair the position of the Division of Taxation of the State of New Jersey in the case at bar.

The Court's concern with punitive retroactivity in its opinion in *Central Illinois Public Service Co., supra*, is a recent manifestation of a concern which was expressed by this Court many years ago. In *Welch v. Henry*, 305 U.S. 134 (1938), the Court enunciated the starting point for an analysis of the constitutionality of retroactive imposition of taxes:

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

305 U.S. at 147

This Court's concern with the interplay of the due process clause and retroactive governmental conduct was expressed again and elaborated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), in which the Court rejected a claim by coal mine operators that the due process clause barred the imposition of liability on them for pneumoconiosis contracted by former employees.

> It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former. Thus, in this case the justification for the retrospective imposition of liability must take into account the possibilities that the Operators may not have known of the danger of their employees contracting pneumoconiosis and that even if they did know of the danger their conduct may have been taken in reliance

> upon the current state of the law which imposed no liability on them for disabling pneumoconiosis.

428 U.S. at 17-18, and:

> Whether or not a person who could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct has been significant in at least one line of cases in this Court. In *Welch v. Henry*, 305 U.S. 134, the Court upheld against a due process attack a state statute enacted in 1935 taxing 1933 dividend income that the 1933 taxing statute had explicitly exempted. Adopting the view that a stockholder would have continued to receive corporate dividends even if he knew that the dividends would subsequently be taxed, the Court distinguished prior cases invalidating the retroactive taxation of gifts on the ground that the donor might have refrained from making the gift had he anticipated the tax.

428 U.S. at 18, n. 16.

Ingredients of the due process test, derived from *Central Illinois Public Service Co., Welch v. Henry,* and *Usery v. Turner Elkhorn Mining Co.*, can include whether the state's retroactive activity has a "punitive" effect *or* whether the citizen would have altered his or her conduct during the relevant period had the citizen been aware of the impending alteration of the government's requirements.

In Airwork's case, both ingredients are present. The imposition on Airwork of its customers' sales taxes is punitive by its very nature. *Cf.*, N.J. Stat. Ann. 54:32B-14; 54:32B-12. Second, the record of this case demonstrates beyond a shadow of a doubt that Airwork would have collected the taxes from its customers during the relevant period had it not been instructed to refrain.[6] Thus, the

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6. An analogy to the case at bar can be found in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), *reh'g denied*, 431 U.S. 975 (1977). In that case, this Court held that statutes could form elements of contracts and that repeal of those statutes, after citizens have relied on them, may impair the obligations of a contract contrary to art. I, §10, cl. 1, of the Constitution. The State's inability to impair the obligations of a contract between private persons was held in *United States Trust Co. of New York, supra*, to apply equally to the impairment of the state's own contracts. 431 U.S. at 18. At least one lower court

New Jersey Supreme Court's decision in *Airwork* is at war with the United States Supreme Court decisions cited above. In addition, it is at war with decisions in other states. *Illinois Bell Telephone Co. v. Allphin*, 95 Ill. App.3d 115, 419 N.E.2d 1188 (1981), *aff'd*, 93 Ill.2d 241, 443 N.E.2d 580 (1982); *Appeal of Denman*, 120 N.H. 568, 419 A.2d 1084 (1980); *Department of Revenue v. Family Hospital, Inc.*, 105 Wis.2d 250, 313 N.W.2d 828 (1982).

Although this Court recently held in *United States v. Darusmont* 449 U.S. 292 (1981) that the due process clause does not prevent the retroactive alteration of income tax rates, the *Darusmont* opinion's language makes it evident that the contrary result would have been achieved in the *Airwork* case because Airwork, in contradistinction to *Darusmont* had "no reason to suppose that [the] transactions . . . [would] be taxed at all." 449 U.S. at 300. Indeed, this Court in *Darusmont* was careful to emphasize that the only effect on the taxpayer of the change in tax rate was the taxpayer's failure to take advantage of a more favorable rate while he still could. The logic of *Darusmont* dictates that the opposite result would be called for where, as here, Airwork was not intended to be the taxpayer in the first place, was misled by the state itself to believe that the subject transactions would not be taxed at all is now being punished for heeding the state's own instructions—a far cry from being asked to pay the fair share of someone who is "privileged to enjoy the benefits of government." 449 U.S. at 299.

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has held that the rationale of *United States Trust Co. of New York, supra*, applies to regulations as well as to statutes. *Smith v. Sorensen*, 748 F.2d 427 (8th Cir. 1984). The analogy between the facts in *United States Trust Co. of New York* and those in the case at bar is easily drawn since the relationship between the State of New Jersey and its citizen tax collectors—the retail merchants, including Airwork—is more one of contract than a relationship of taxing authority and taxpayer. This is so because Airwork is not the taxpayer of sales taxes under New Jersey's statutory scheme but is rather a citizen who, as a condition of engaging in retail trade within the state, is obliged to contract with the state to collect the state's sales taxes from consumers. N.J. Stat. Ann. 54:32B-12(a). To say, as the New Jersey Supreme Court has said, that the state is free to alter retroactively its contract with Airwork is to ignore Airwork's reliance interest in the State's published instructions and the massive and certain detriment suffered by Airwork as a result of the retroactive change, the latter element in marked contrast to the bondholders' somewhat conjectural interest in *United States Trust Co. of New York, supra*.

JURISDICTION

Although the New Jersey Supreme Court concluded its opinion in this case with the statement that the Constitutional issues raised by Airwork "were not determined by the courts below" and declined to rule on them, the record in this case makes it clear that the contrary is correct. The decision by the Tax Court of New Jersey specifically listed the following in its recitation of the issues presented on appeal:

> 2. Did defendant's failure to comply with the notice and hearing provisions of the APA deny plaintiff due process of law?

2 N.J. Tax at 339. The Tax Court, citing this Court's decisions in *Central of Georgia R.R. Co. v. Wright*, 207 U.S. 127 (1907), *Gallup v. Schmidt*, 183 U.S. 300 (1902), and *Williams v. Eggleston*, 170 U.S. 304 (1898), concluded that Airwork's right to due process of law was entirely satisfied by affording it an opportunity to litigate the propriety of the tax and its retroactive imposition. *Airwork Service Division v. Director, Division of Taxation*, 2 N.J. Tax. 329, 342 (1981). The decision of the Tax Court was affirmed by the Appellate Division of the New Jersey Superior Court without significant comment. 4 N.J. Tax 532 (1982). Why the New Jersey Supreme Court would conclude that Airwork's due process claim was not raised or argued below and why the court would cryptically recommended to Airwork that it pursue its Constitutional claims "before an appropriate tribunal if it chooses to do so" is mystifying, particularly in light of the undisputed nature of the relevant facts. Nonetheless, the New Jersey Supreme Court's refusal to address the Constitutional claim should not bar this Court's consideration of the issue. To find otherwise would enable any state court to prevent review of such claims by the simple expedient of refusing without explanation or basis to consider them.

In the context of a case arising from the administration of state tax laws, the New Jersey court's refusal to hear the constitutional claims is particularly troubling, because access to Federal courts when state tax matters are involved is virtually foreclosed *except* by writ of certiorari in this Court. 28 U.S.C. §1341; *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981).

CONCLUSION

This Court should grant Airwork's Petition for a Writ of Certiorari because the New Jersey Supreme Court has decided a Federal question in a way which is in conflict with the decisions of this Court and with the decisions of other state courts of last resort. If not reversed, the decision by the New Jersey Supreme Court in *Airwork v. Director* will serve as a convenient blueprint for officials of any state to avoid the most elemental dictates of the due process clause of the Fourteenth Amendment to the United States Constitution and will serve as a boobytrap for any citizen of the State of New Jersey who is unfortunate enough to abide by the state's own directives.

Respectfully submitted,

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March 29, 1985

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Re: Airwork Service Division vs.
Director, Division of Taxation

Dear John:

As you are aware, we have filed a Petition for a Writ of Certiorari with the United States Supreme Court on behalf of Airwork Service Division.

We note that Supreme Court Rule 36.1 provides for the filing of a brief by an amicus curiae upon written consent of the parties. In that regard, we hereby consent to your participation in this matter on behalf of the Consumer Bureau if you so decide.

Very truly yours,

GERALD C. NEARY

GCN:mo